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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JEFFREY O. JOYNER,

Plaintiff and Appellant,

v.

JERRY LAZZARESCHI,

Defendant and Respondent.

G040323

(Super. Ct. No. 05CC10627)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Peter J. Polos, Judge. Affirmed.

Lenore L. Albert for Plaintiff and Appellant.

Ford, Walker, Haggerty & Behar, Timothy L. Walker and K. Michele Williams for Defendant and Respondent.

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Plaintiff Jeffrey O. Joyner appeals from a judgment dismissing his defamation and related claims against defendant Jerry Lazzareschi. Plaintiff contends the trial court erred by concluding immunity for “interactive computer service” providers under the Communications Decency Act (CDA) barred his claims. (47 U.S.C. § 230(c).) He also argues the trial court abused its discretion by denying his requests for an order to show cause concerning whether defendant committed contempt or discovery abuses and to continue the summary judgment hearing. As we explain below, defendant’s contentions have no merit, and we therefore affirm the judgment.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff coached two soccer teams for teenage girls, FRAM and Infinity. In 2004, he merged the teams into one with the better players from each, resulting in parental unrest and heated discussion in the girls’ soccer community that spilled onto the internet, including the message boards on defendant’s website, [www.socalsoccertalk.com](http://www.socalsoccertalk.com). The website had over 600 members, who registered by providing their e-mail address. But anyone, including nonmembers, could freely view and post messages to the site as an unregistered “guest.” On any given day, between 200 and 500 messages were posted to the site on a variety of topics related to girls’ soccer.

In early 2005, plaintiff became aware of messages posted to the site he claimed defamed him as “a cheater and a thief” who, in merging the two teams, committed “financial improprieties” such that “a third party audit of the finances . . . could prove interesting.” Another message, according to plaintiff, libeled him as unprofessional and incompetent for “coach[ing] (his team FRAM) into the ground.” Each message identified its poster only as a “Guest,” also specifying the poster was

“unregistered.” According to plaintiff, internet users posted more than 2,000 messages on [www.socalsoccertalk.com](http://www.socalsoccertalk.com) concerning the team merger, and those messages were viewed an aggregate 84,000 times or more. Some of the messages were posted in threads defendant entitled “CRSC/FRAM” and “New Allegations.”

After fruitless efforts to have defendant remove the postings plaintiff deemed defamatory from the website (defendant disputed plaintiff ever notified him), plaintiff filed a complaint against defendant and 100 doe defendants. The complaint alleged six causes of action: (1) negligence, (2) negligent training/supervision, (3) defamation, (4) interference with contractual relations, (5) interference with prospective economic advantage, and (6) intentional infliction of emotional distress. The gravamen of all of plaintiff’s claims was that defendant or the doe defendants were responsible for the allegedly defamatory messages posted on [www.socalsoccertalk.com](http://www.socalsoccertalk.com).

The complaint alleged generally that “defendants posted defamatory content on [the] WEBSITE.” More specifically, the complaint stated that, in December 2004 and thereafter, “PARENTS and other DOE defendants . . . published several written statements on WEBSITE falsely charging Plaintiff with [the] crime of being a thief and/or defrauder” and “imputing . . . incompetence, with reference to his . . . profession . . . .” As to defendant, the complaint alleged he “republished these statements in writing” to other soccer websites “to lure more viewers to [his] WEBSITE.” Plaintiff’s complaint also included a seventh cause of action, for fraud, against Domains by Proxy, Inc., for permitting defendant to obtain and register the name [www.socalsoccertalk.com](http://www.socalsoccertalk.com) anonymously.

The trial court granted defendant’s anti-SLAPP motion, which we reversed on appeal because the dispute was not a matter of public interest within the protection of

the statute. (Code Civ. Proc., § 425.16.) As we explained, “““public interest” does not equate with mere curiosity.’ [Citation.] . . . To be a matter of public interest, the issue must have public *significance*.” (Joyner v. *www.socalsoccertalk.com* (Jun. 13, 2007, G037181) [nonpub. opn.] )

On remittitur, defendant served responses to plaintiff’s written discovery requests and filed a summary judgment motion. After defendant defaulted, the trial court vacated the default for defendant to answer the complaint and set the hearing on the summary judgment motion for February 14, 2008.

On January 30, 2008, plaintiff filed an ex parte motion for an “Order Issuing an OSC for Contempt and/or Misuse of Discovery.” (Capitalization modified and bold typeface removed.) Plaintiff charged defendant with spoliation of evidence because the numbering of particular posts in the thousands of messages defendant produced differed from the numbering of the posts as printed out and attached to plaintiff’s complaint. In her declaration attached to the motion, plaintiff’s counsel sought terminating sanctions against defendant. The same day, plaintiff also filed a motion to continue the summary judgment hearing because of defendant’s alleged discovery misdeeds and because defendant Domains by Proxy’s discovery responses were not due until the end of March 2008. Plaintiff did not explain how the discovery responses of an internet name registrant like Domains by Proxy would illuminate whether defendant Lazzareschi posted defamatory content on his website.

In his reply to plaintiff’s motions, defendant explained the numbering of the posts differed because his discovery responses omitted duplicate posts. Defendant demonstrated he had not deleted or modified any of the posts plaintiff alleged in his complaint were defamatory. The trial court concluded plaintiff failed to show good cause

to obtain an OSC. The trial court also later denied plaintiff's request for a continuance, concluding plaintiff "has not put forth what evidence he expects to obtain and how that would serve to create a triable issue of fact as required by the code."

Plaintiff had filed his opposition to the summary judgment motion on January 31, 2008. Earlier however, plaintiff had demurred to defendant's answer. After the trial court sustained the demurrer with leave to amend, defendant filed his amended answer on February 13, 2008, the day before the summary judgment hearing.

The trial court continued the hearing until March 13, granting plaintiff permission to file a supplemental opposition to summary judgment to address any new matters in the amended answer. Plaintiff filed an extensive supplemental opposition expanding his separate statement of facts and other aspects of his original opposition unrelated to the amended answer. Nevertheless, the trial court concluded plaintiff failed to raise a triable issue of material fact, granted defendant's summary judgment motion, and plaintiff now appeals.

## II

### DISCUSSION

Plaintiff contends the trial court erred by concluding the CDA immunized defendant because he provided an "interactive computer service" on which or through which he neither posted nor otherwise created defamatory content, thereby falling outside the scope of persons potentially liable as "information content provider[s]." (47 U.S.C. § 230(c) & (f).) We review the trial court's summary judgment ruling de novo. (*Barber v. Chang* (2007) 151 Cal.App.4th 1456, 1462 (*Barber*).)

Section 230(c) of the CDA provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided

by another information content provider.” An “information content provider” is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” (47 U.S.C. § 230(f)(3).) An “interactive computer service” is “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server . . . .” (47 U.S.C. § 230(f)(2).) Section 230(e)(3) provides: “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”

“These provisions,” our Supreme Court explained in *Barrett v. Rosenthal* (2006) 40 Cal.4th 33 (*Barrett*), “have been widely and consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source. The immunity has been applied regardless of the traditional distinction between ‘publishers’ and ‘distributors’ . . . . [¶] . . . [¶] . . . Until Congress chooses to revise the settled law in this area . . . , plaintiffs who contend they were defamed in an Internet posting may only seek recovery from the original source of the statement.” (*Id.* at pp. 39-40.)

Phrased differently, “The touchstone of section 230(c) is that providers of interactive computer services are immune from liability for content created by third parties. [Fn. omitted.] The immunity applies to a defendant who is the ‘provider’ . . . ‘of any information provided by’ someone else. [Citation.] ‘[R]eviewing courts have treated § 230(c) immunity as quite robust.’” [Citation.]” (*Fair Housing Council v. Roommates.com, LLC* (9th Cir. 2007) 489 F.3d 921, 925 (*Roommates.com*), vacated for en banc rehearing in *Fair Housing Coun., San Fernando v. Roommates.com* (9th Cir. 2008) 521 F.3d 1157 (*Roommates.com II*).)

Section 230(c) immunity applies where: (1) the defendant provides an interactive computer service, (2) the complaint treats the defendant as a publisher or speaker of information, and (3) the information at issue was provided by another information content provider. (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 804-805 (*Delfino*); *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 830.) The immunity bars not only defamation actions but extends to “tort claims other than defamation.” (*Delfino*, at p. 806; see 47 U.S.C. § 230(e)(3) [“No cause of action may be brought and *no* liability may be imposed” where immunity applies], italics added.)

There is no question defendant meets the first prong of *Delfino*’s three-part test because, by providing hundreds or thousands of soccer-minded computer users access to his website, which by definition was hosted on a computer server, defendant provided an interactive computer service. (See 47 U.S.C. § 230(f)(2) [interactive computer service provider “enables computer access by multiple users to a computer server”].) It is well established that CDA immunity applies to website owners and operators. (See *Delfino, supra*, 145 Cal.App.4th at p. 805 [collecting cases].)

The second prong similarly applies to all of plaintiff’s causes of action because the gravamen of each claim was defendant’s alleged defamation of plaintiff. (See *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153 [interference with a contract or prospective economic advantage requires plaintiff to plead and prove defendant committed an underlying tort]; see also, e.g., *Doe v. America Online, Inc.* (Fla. 2001) 783 So.2d 1010 [CDA bars negligence action for failure to control third party’s postings]; *Pickett v. InfoUSA* (E.D. Tex. 2006) 2006 WL 887431

[CDA bars claims of intentional infliction of emotional distress resulting from third party content].)

Plaintiff failed to demonstrate a triable issue of fact existed on the third prong, i.e., whether defendant rather than a third party provided the defamatory content at issue. As noted, the complaint alleged defendant “republished” statements made by third parties. *Barrett*, however, rejected republication as basis for liability, finding CDA immunity applied where the defendant posted to two websites a copy of an allegedly defamatory article written by another. (*Barrett, supra*, 40 Cal.4th at p. 60, fn. 19.) Consequently, plaintiff’s characterization on appeal that defendant “advertized” [*sic*] the allegedly defamatory material by posting reference to it on other websites furnishes no basis for liability. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) As *Barrett* explained, the view “that actively selected and republished information is no longer ‘information provided by another information content provider’ under section 230(c)(1)” is groundless. (*Barrett*, at p. 62.) Rather, “[a] user who actively selects and posts material based on its content fits well within the traditional role of ‘publisher.’ Congress has exempted that role from liability.” (*Ibid.*)

Plaintiff relies on Justice Moreno’s concurring opinion in *Barrett*. There, Justice Moreno explained his view that CDA immunity would not apply to a conspiracy in which two parties agreed to defame another, with the judgment-proof conspirator “play[ing] the role of original ‘content provider’” and the other conspirator posting the information. (*Barrett, supra*, 40 Cal.4th at pp. 63-64.) Justice Moreno found the evidence insufficient to support the plaintiffs’ charge of conspiracy in their complaint. (*Id.* at p. 65.)



Unlike the plaintiffs in *Barrett*, however, plaintiff here failed to plead a conspiracy in his complaint. On appeal, we look to the pleadings to identify the issues framed for summary judgment. (*Barber, supra*, 151 Cal.App.4th at p. 1462.) Plaintiff never sought to amend his complaint to plead conspiracy; accordingly, we do not reach his novel claim. In any event, Justice Moreno concluded in *Barrett* there was insufficient evidence of a preconceived plan or unity of design or purpose between the defendants, though they knew each other and shared similar low opinions of plaintiffs' alternative medicine practice. Here, not only did plaintiff fail to allege a conspiracy theory in his complaint, he produced no evidence whatsoever that defendant knew any of the persons posting content to his site, defamatory or not. Consequently, the requisite agreement and unity of design are wholly lacking.

Plaintiff's reliance on *Roommates.com* is also unavailing. There, an online roommate matching service culled its subscribers' preferences as to children, gender, sexual orientation, race, and other classifications. The site categorized its members accordingly and channeled potentially compatible members to each other. The Ninth Circuit concluded CDA immunity did not apply to a website designed to force subscribers to divulge protected characteristics and discriminatory preferences and to match roommates based on criteria prohibited by the Fair Housing Act. The court held the website was not immune from liability under the CDA because, "[b]y categorizing, channeling and limiting the distribution of users' profiles," the online service provided "an additional layer of information that it was 'responsible' at least 'in part' for creating or developing." (*Roommates.com, supra*, 489 F.3d at p. 929.) The information provided by the website was closely related to, and indeed allegedly fostered or induced, discriminatory offers of housing on the site. In reaffirming the absence of CDA

immunity on rehearing, the en banc court specifically noted the website's "connection to the discriminatory filtering process" was "direct and palpable." (*Roommates.com II*, *supra*, 521 F.3d at p. 1169.)

*Roommates.com* is inapposite because no evidence suggested defendant engaged in any filtering remotely related to defaming plaintiff. Plaintiff points to his expert's declaration that, under the software used to run the site, only defendant could start message threads on any given topic, and therefore defendant must have created the "CRSC/FRAM" and "New Allegations" threads in which the allegedly defamatory messages appeared. But starting threads on topics of interest in the girls' soccer community is not by itself defamatory. Presumably, positive messages about plaintiff or messages defending him could be and were posted under the foregoing, general thread headings. Plaintiff admits as much when he speculates that "[i]f Mr. Lazzareschi did so much as to delete posts that were favorable to Mr. Joyner, that is sufficient basis to hold Mr. Lazzareschi liable." (Italics added.)

Plaintiff's declaration stated he, his friends, and his attorney monitored and posted to the site. Yet he submitted no evidence any positive messages about him were ever deleted. His theory that liability would attach "if" messages were deleted is pure conjecture and therefore not a basis for denying summary judgment. (See *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 11 [summary judgment opposition "deemed insufficient when it is essentially conclusionary, argumentative or based on conjecture and speculation"].)

Plaintiff asserts defendant "posted to the string[s]" or threads he created, "edited words from the messages, deleted and moved posts, and even posted suggestions." Plaintiff does not explain the relevance of these assertions. Instead, he

simply cites generally to hundreds of pages in the record, but it is plaintiff's responsibility on appeal to make his point and support it with specificity. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; Cal. Rules of Court, rule 8.204(a)(1)(B) & (C).) We need not comb through a voluminous morass on behalf of an appellant; to the contrary, we presume the record supports the judgment unless appellant affirmatively demonstrates error. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.)

The only allegations plaintiff specifies are that defendant posted one or more of the trial court's rulings in the two message threads he created and, on another occasion, edited his name from a message plaintiff's counsel posted to the site revealing his identity. Neither publication is defamatory. After the edit removing defendant's name, the message displayed a tag apparently generated by the site software stating the message had been edited by the site administrator. Plaintiff, however, never asserted plaintiff edited any of the allegedly *defamatory* messages posted to the site, nor produced any evidence with software tags or other indicia of editing in those messages.

Consequently, unlike in the *Roommates.com* scenario, no evidence — let alone “direct and palpable” evidence (521 F.3d at p. 1169) — connected defendant to a posting or filtering process that was discriminatory or defamatory against plaintiff. A court ruling is not defamatory. (Civ. Code, § 47.) And it is pure conjecture that because defendant edited a message to preserve his anonymity on the internet, he must also have edited messages that allegedly defamed plaintiff, thereby somehow participating in the defamation. In any event, defendant's premise is faulty: editing does not amount to participation in defamation. (See *Barrett, supra*, 40 Cal.4th at p. 60, fn. 19 [“many courts have reasoned that participation going no further than the traditional editorial functions of

a publisher cannot deprive a defendant of section 230 immunity”].) Because defendant’s argument is only speculative concerning the evidence and unfounded on the law, it offers no basis for reversal.

Plaintiff asserts the doctrine of *res ipsa loquitur* relieved him of his burden to present evidence opposing summary judgment. Not so. The doctrine only applies where an accident injuring the plaintiff “must be caused by an agency or instrumentality within the *exclusive* control of the defendant . . . .” (*Baumgardner v. Yusuf* (2006) 144 Cal.App.4th 1381, 1389, italics added.) That is patently not the case with a message board website, as here, where innumerable persons may post. Moreover, even if defendant monitored and approved for posting every single message that appeared on the site, which plaintiff neither alleged nor made any effort to demonstrate, *Barrett’s* republication rule would immunize defendant, as discussed *supra*. (See *Barrett, supra*, 40 Cal.4th at p. 62.)

Plaintiff suggests federal precedent somehow relieves a party opposing summary judgment of any obligation to demonstrate the existence of a triable issue of fact. Plaintiff cites *Cisnero v. Sanchez* (S.D. Tex. 2005) 403 F.Supp.2d 588 (*Cisneros*) and *Rogers v. Home Shopping Network* (C.D. Cal. 1999) 57 F.Supp.2d 973 (*Rogers*) for this dubious proposition. Plaintiff discerns in both cases a federal presumption that “the defendant must have posted the information unless the defendant affirmatively shows that the content was provided by another through [*sic*] identifying the other persons.” We have reviewed both cases and neither creates such a presumption. *Cisneros* involved the standard for removal from state court to federal court for federal-question jurisdiction. *Rogers* concluded the requirement for “good cause” (Code Civ. Proc., § 425.16, subd. g) for discovery in the anti-SLAPP context does not apply in federal court. Neither case

created a presumption concerning defamatory postings by which a plaintiff may avoid summary judgment or obtain a continuance the plaintiff fails to justify. Plaintiff's insistence to the contrary is without merit.

Plaintiff obliquely suggests, purporting to incorporate by reference arguments he apparently made in his earlier anti-SLAPP appeal, that federal preemption and forum shopping considerations preclude CDA immunity. The former appeal, however, is a separate matter in a distinctly different posture from the present one, which does not involve the anti-SLAPP statute. The two appeals are separate judicial proceedings, yet plaintiff never requested judicial notice of the earlier appeal. We decline to countenance the purported incorporation by reference. As noted, appellant bears the burden of supporting each of his contentions specifically with argument and, if possible, citation to authority. (Cal. Rules of Court, rule 8.204(a)(1)(B).) Plaintiff may not saddle defendant or this court with the burden of discerning how his former arguments may be pertinent in the different context presented here. Moreover, in any event, to the extent we can discern plaintiff's argument, it is without merit. *Barrett* explained that uniform federal precedent *favoring* broad immunity under 47 U.S.C. 230(c) counseled adherence to that view, to avoid forum shopping by defamation *plaintiffs*. (*Barrett, supra*, 40 Cal.4th at p. 58.) Plaintiff *chose* his forum, and therefore should not be surprised *Barrett's* rule of broad immunity applies. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Plaintiff asserts the trial court's erroneous refusal to grant his motion to continue the summary judgment hearing prevented him from obtaining evidence defendant personally participated in defaming him on the website. But that was not his theory below. Whether to grant a continuance rests in the sound discretion of the trial

court. (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395.) The “interests at stake are too high,” however, “to sanction the denial of a continuance without good reason.” (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633-634.)

Below, in moving for the continuance on January 30th, plaintiff sought a delay not to procure discovery from defendant, but to receive defendant Domain by Proxy’s discovery responses and to resolve his request for an OSC and terminating sanctions based on the purported “altered web pages” allegedly demonstrating defendant’s contempt and discovery abuse. True, plaintiff suggested defendant’s discovery responses “largely contained objections,” but plaintiff expressed hope his apparent disagreement with the objections could be resolved in “informal meet and confer discussions” before filing a motion to compel. Although the trial court continued the summary judgment hearing from February 14th to March 13th, affording ample time to meet and confer, plaintiff never filed a motion to compel discovery from defendant.

We conclude the trial court did not err in denying plaintiff’s motion to continue the summary judgment hearing. Plaintiff lulled the trial court into believing a motion to compel would be filed if plaintiff remained dissatisfied with defendant’s discovery responses. The trial court resolved plaintiff’s OSC request against him on the basis of the party’s declarations, and we are not at liberty to revisit that credibility determination. (*Kroopf v. Guffey* (1986) 183 Cal.App.3d 1351, 1356.) And finally, plaintiff never explained what information he could possibly obtain from Domains by Proxy — merely an internet name registration service — that would show *defendant* personally posted defamatory content on his website. Plaintiff forfeited the contention he might have extracted pertinent information from further discovery *from defendant* by not raising that as a grounds for continuance. (See *People v. Partida* (2005) 37 Cal.4th 428,

435 [“A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct”].)

We note, moreover, that although plaintiff stresses on appeal the theory that discovery *might* — again, speculatively — have shown defendant personally originated the defamatory content, he failed to alert the trial court of any particular discovery requests germane to that inquiry. Notably, for example, in his request for admissions, plaintiff never demanded that defendant admit *he* “called” plaintiff “a ‘cheater and a thief’ on [www.socalsoccertalk.com](http://www.socalsoccertalk.com),” but only that plaintiff “was called” those names on the site. Such discovery questions were consistent with plaintiff’s legally invalid theory in his complaint that defendant was secondarily liable for “republish[ing]” defamatory content, but not with the theory that defendant originated any defamatory statements. Consequently, the trial court reasonably concluded plaintiff “has not put forth what evidence he expects to obtain and how that would serve to create a triable issue of fact as required by the code.” Plaintiff’s failure to specify the pertinent discovery he required in a motion to compel justified the trial court’s ruling.

III

DISPOSITION

The judgment is affirmed. Defendant is entitled to his costs on appeal.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.